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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

QUESTION PRESENTED I

Arizona's Brief does no more than point up the basic inquiry of Petitioner's Question Presented I, which is whether Section 28 of the *Act* clearly manifests a Congressional intent that upon condemnation a lessee from Arizona shall have no compensable property right, except the value of the lessee's

improvements. The Opinion below of the United States Court of Appeals, 9th Circuit, found in the Appendix to the Petition for Writ of Certiorari, 9th Cir. 1974, 495 F.2d 12, recognized such issue by saying:

> "The Fifth Amendment provides that private property may not be taken for a public use without just compensation. See United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). That provision would guarantee to Alamo the right to compensation if they had obtained from Arizona a property right superior to or equal to the trust. However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo. Alamo therefore never acquired a property right for which it is entitled to compensation." 495 F.2d at 14.

Section 28 is silent about condemnation. Although one paragraph begins with a prohibition against a mortgage or other encumbrance of the lands, the same paragraph carefully provides in part,

> "Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less;".

It is this wording that Petitioner contends gave, in spite of the above logic of the Court of Appeals below, Arizona the power to grant a compensable property right to Alamo. In reliance upon basic principles of agency and trust law, plus specific

on-point case law,[1] Petitioner contends Congress delegated to Arizona, as trustee, the discretion to lease with or without a condemnation clause. Here, apparently to make the leasing more attractive and to enhance the leasing possibilities,[2] Arizona chose to lease without a condemnation clause.

Lassen v. Arizona Highway Dep't., 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), said:

> "We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries 'derive the full benefit' of the grant." 87 S. Ct. 584 at 589.

and,

> "The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." 87 S. Ct. 584 at 588.

While this wording is applicable to the *Lassen*

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1. Saying a school trust lessee does have a property right or an interest compensable in condemnation.

2. See Amicus Curiae briefs of New Mexico, some of its lessees and of lending institutions in support of the Petition for Writ of Certiorari herein, which evidence real concern for the future of state grazing lessees if the Opinion below stands which Opinion, in effect, adds a condemnation clause to the lease, by preventing the lessee from sharing in condemnation proceeds, except as to improvements.

determination that Arizona must pay eminent domain compensation in money, it should not be literally applied herein when unfettered discretion is given to the Arizona Legislature which delegated such to Arizona's Land Department[3] to determine the manner of leasing. The *Act's* provisions that prohibited the sale of lands for less than their appraised value do not say that a lessee may not share in condemnation proceeds, nor is such said in the provisions about setting up a separate fund for the objects for which the grants are made or confirmed. These are the provisions relied on in *Lassen*. The Arizona Legislature was still given the right to determine whether in its judgment and discretion it should lease with or without permitting the lessee to share in condemnation proceeds. Who should know better than the local entity, based upon the exigency of the situation at the time of leasing, whether more money or more leasing could be accomplished by not requiring a condemnation clause?

There is no reason why the United States of America should not be considered like any other trustor. Thus, solution lies in determining whether any trustee, whose duty is to act for the sole benefit of the trust beneficiary when the trust instrument gives to the trustee the right to lease and the discretion to determine the manner of leasing, may legally decide not to require a condemnation clause, thereby permitting the lessee to share in condemnation proceeds. The exercise of a trustee of the power to lease requires reasonable acting, and no more. *76 Am. Jur. 2d Trusts* § 478, at 695, 696; *90 C.J.S. Trusts* § 319 *a* and *b(1)*, at 496-498; *Richard v. Midkiff*, 48 Hawaii 32, 396 P.2d 49, 64; *In re Clayton's Estate*, 127 Colo. 592, 259 P.2d 617, 621; *Restatement of the Law of Trusts 2d* § 189. Arizona chose to introduce no testimony below to

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3. § 37-281 *A*, *A.R.S. 1956*.

challenge the reasonablness of its Land Department in not inserting a condemnation clause.[4] Instead, it challenged the basic authority from the *Act*. Basic agency law also supports Petitioner. Unless agreed to the contrary, authority to make a contract permits it to be done in the usual form or if there is not a usual form, then in an appropriate and reasonable manner. *2 Am. Jur. 2d Agency* § 84, second paragraph, p. 488; *Restatement of the Law of Agency 2d* § 51. This trust and agency law means Arizona had the power to decide whether to insert a condemnation clause, unless there was evidence, which there was not, that it acted unreasonably by so doing. No one said as many leases could be issued if such a clause was inserted. No one said cattle operator lessees would still get needed financing if such a clause were added. Such a clause is obviously a concern for otherwise why would New Mexico state lessees, New Mexico and financing institutions of state lessees have filed briefs in support of certiorari?

Arizona would destroy this logic by arguing that at a private sale Arizona would get all. But if this reasoning is applied to any lease without a condemnation clause where the landlord could terminate and sell, then it would mean the tenant could not, upon condemnation, receive the value of the leasehold. No case that Petitioner can find so holds. Instead, the law is that the existence of a clause permitting the landlord to terminate under certain conditions does not render the leasehold of no value, but is simply an element affecting value. *Canterbury Realty Co. v. Ives*, 153 Ct. 377, 216 A.2d 426; *State v. Yale Oil Corp. of South Dakota*, 88 Mont.

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4. Every presumption is in favor of a trustee's honest exercise of his discretion. *Neel v. Barnard*, 24 Cal. 2d 406, 150 P.2d 177. Obviously, the presumption stands in the absence of contrary evidence.

506, 295 P. 255; *State v. Keneally*, 142 Mont. 256, 384 P.2d 770; *Spencer v. Fargo*, 114 Conn. 527, 159 A. 349, and *Iron City Automobile Co. v. City of Pittsburgh*, 253 Pa. 478, 98 A. 679.

No specific wording in the *Act* prohibits the creation of a property right in Arizona's lessee. It is basic eminent domain law "that a tenant for years under a written lease is an owner of property in the constitutional sense, and is entitled to share in the compensation when all or a part of the property leased is taken by eminent domain under the term of the above lease[3]." *27 Am. Jur. 2d Eminent Domain* § 250, p. 21. Footnote 3 cites many state and federal cases as support for this statement, which includes two United States Supreme Court decisions, and *Nebraska v. United States*, 164 F.2d 866 (8th Cir. 1947), relied upon by Petitioner. The decision in *Nebraska*, as well as the decision of the Court of Appeals below, turned upon whether the pertinent enabling act created a property right in the state's lessee. *Nebraska* said yes, and the Court of Appeals below said no. The Court of Appeals below distinguishes *Nebraska* by saying:

> ". . . the Nebraska Enabling Act does not contain the express restrictions which are incorporated in the Arizona Act. United States v. 78.61 Acres of Land, 265 F.Supp. 564 (D.C.Neb.1967)." 495 F.2d 12 at 15.

Perhaps the reason the Court of Appeals below did not then enumerate the express restrictions is because, upon analyzation, the *New Mexico-Arizona Act*, Section 28, does not contain any express restrictions as to the manner of leasing. Both this *Act* and the *Nebraska Act* placed the respective state in the position of a trustee. The Nebraska District Court case cited in the above quotation interpreted *Lassen* as does Petitioner by saying:

> "School lands, however, are held by the state as trustee, and are available to the state only for the support of common schools. As trustee, the state can dispose of school lands only for the benefit of the cestui que trust." 265 F. Supp. 564, at 566.

Any trustee must act reasonably. Thus Arizona and Nebraska were in identical positions concerning whether to add a condemnation clause prohibiting the lessee from sharing in condemnation proceeds, except as to improvements. Petitioner says that when the *Act* gave the Arizona Legislature the right to determine the manner of leasing, it left it to that Legislature or to the agency that the Legislature delegated the lease terms, power to determine whether the trust would be better benefited by including or not including a condemnation clause. This power stands unless there was evidence it was unreasonably exercised. *Boland* v. *Mercantile Commerce Bank & Trust Co.*, 349 Mo. 731, 163 S.W.2d 597; *In re Reckford's Will*, 307 N.Y. 165, 120 N.E.2d 696; *First-Trust Joint Stock Land Bank of Chicago* v. *Hickok*, 367 Ill. 144, 10 N.E.2d 646; *Central Hanover Bank & Trust Co.* v. *Hoey*, 74 F. Supp. 770 (D.C.N.Y.); *In re Willenbrock's Estate*, 228 Iowa 234, 290 N.W. 502. Petitioner's Opening Brief, at 15, shows the vast number of lands, 78,000,000 acres, that may be affected by this question.

Until the Opinion of the Court of Appeals below, the unanimous rule was that every case that considered the issue determined that a lessee of school trust lands, upon condemnation, had a compensable property right. *State* v. *Platte Valley Pub. Power & Irrig. Dist.*, 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196; *Nichols* v. *Oklahoma City*, 195 Okla. 305, 157 P.2d 174; *City of Oklahoma City* v. *Garnett*, 296 P.2d 766 (Okla.). *State* v. *Platte Valley* did not allow Oklahoma's lessee of state land

to seek additional eminent domain compensation for the right to re-lease at the expiration of the 25 year lease term, because such was merely a right to lease provided no person offered a higher bid in a return to the state.[5] Such case distinguished the Nebraska statute applicable to re-leasing from a prior statute, similar to Arizona's pertinent statute, that flatly gave the lessee a preferred right to renewal. Then the case explained why the renewal right was not allowed, saying:

> "It depends upon whether or not some third person, at the expiration of the lease, makes a higher bid than that of the lessee. That is purely speculative." 166 A.L.R. 1196 at 1207.

Arizona's is not speculative, but specifically says if there is re-leasing, a lessee who has substantially complied with the terms of his lease has a preferred right of renewal. § 37-291, *A.R.S., 1956*. *City of Oklahoma City* v. *Garnett*, above, rejected the proposition "that a preference right of a school land lessee to renew his lease from time to time as the existing lease expires is not a proper element of damages where a leasehold is taken in condemnation", saying:

> "It is true that upon the expiration of a lease if the commissioners of the Land Office of the State of Oklahoma choose not to renew it, or to sell the land, the lessee has no remedy to compel them to do so, but the fact that the land is always for sale or lease renders the right to buy at the appraisal, or to re-lease a valuable one." 296 P.2d 766 at 769.

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5. But the lessee was held to be entitled to compensation for the unexpired lease term.

The evidence below, as shown in Petitioner's Opening Brief, was in accordance with what was said in this last above quotation. Arizona did not challenge the fact that but for the condemnation, the land in question would have been re-leased to Alamo for two additional ten-year terms. The District Court specifically so found.[6] (A. 4) The testimony as to the length of the lease depended upon how long it would take to reclassification. Petitioner did not attempt to extend the leasing beyond reclassification, as it could have, because § 37-290, *A.R.S. 1956* again, upon reclassification, gave Petitioner a preferred right to lease the reclassified land at the reappraised rental thereof. Nor did Alamo seek any recovery, as *City of Oklahoma* v. *Garnett* would permit because it could bid at any sale of the state lands and had the advantage of receiving from a competitive purchaser the value of its improvements. § 37-241, § 37-242, *A.R.S. 1956*. It was not necessary for Alamo to delve into any sale issue, because there was no evidence below of any likelihood of any sale of the land Alamo was leasing, probably because of its isolation and its admitted value in conjunction with Alamo's irrigated, by-the-river, fee land, or, conversely, because of its small value if not considered in conjunction with such year-around pasture land.

Petitioner's preferred right to renewal pursuant to the above Arizona statutes is not the speculative, hoped for lease renewal in Arizona's cases such as *Scully* v. *United States*, 409 F.2d 1061 (10th Cir. 1969), and *United States* v. *Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 727 (1946). Petitioner's renewal rights were legal and more than a mere expectancy. They are stronger

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6. His findings must be accepted if supported by the evidence, for then they are not clearly erroneous. *United States* v. *General Dynamics Corp.*, 94 S. Ct. 1186, 1199.

than those in *Almota Farmers Elevator & Whse. Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1, which, although not there legally enforceable, were more than a mere expectancy because of what had happened since 1919, the condemnation being in 1967, and consequently sufficient to permit the lessee to have renewal considered. Even the reasoning of the dissent of this case, when applied to Petitioner's statutory renewal rights, is compatable to Petitioner's position. For an interesting analysis of the general subject matter, see discussion under syllabi 1-3 in *Stroh v. Alaska State Housing Authority*, 459 P.2d 480 (1968 Alas.).

Petitioner should not be thwarted because its preferred renewal right is not enforceable against Arizona as determined in *Manning v. Perry*, 48 Ariz. 425, 62 P.2d 693, because it still has an enforceable legal right against another person to whom the state would lease in violation of its preferred re-lease right. *Manning v. Perry*, above; *Ehle v. Tenny Trading Co.*, 56 Ariz. 241, 107 P.2d 210. *Ehle* held that Arizona's statutory preferred re-leasing right gives the lessee a better or superior right to a lease than another and, in essence, recognized the property right of a lessee by citing and quoting from a Wyoming case that determined by such renewal provisions the legislature made it a state policy to recognize equities of those who have built up a ranching business in the state. Specifically, Wyoming, in *Hogan v. Greenfield*, 58 Wyo. 13, 122 P.2d 850, determined, in an estate matter, that the preferential right of renewal of a lessee of state school land was a property right.

All of these school trust land decisions manifest an idea among the states that a lessee of such lands did have a property right. The Arizona Legislature thought so. *A.R.S.* § 41-511.06, Added Arizona Session Laws 1957, Ch. 99, § 1.

Arizona's Legislature only provided one way that a lessee in compliance with the lease could be ousted from possession prior to expiration of the lease term.[7] This was reclassification by § 37-290 *A.R.S. 1956*, which, as above, gives the lessee a preferred right upon reclassification to re-lease at the reclassified leasing price. The lease, set forth in the Appendix, is in accord. It permits termination upon thrity days written notice after reclassification. See paragraph P., A. 13. Such possibility of termination does not, in and of itself, limit the lease term to the thirty days limitation, but is merely "a circumstance to be considered in determining the proper award to be made." *State* v. *Keneally*, 142 Mont. 256, 384 P.2d 770, 777, discussion under syllabus 14. *Cf. Brooklyn Eastern Dist. Terminal* v. *City of New York*, 139 F.2d 1007 (2d Cir. 1944), discussion under syllabus 10, 11.

The lease provision against the creation of any vested right in the lessee, paragraph Q, A. 14, does not restrict Petitioner's condemnation right. Petitioner, in the Opening Brief, at 17, provided law that the word "vested" meant the estate involved is not subject to any contingency. The above argument shows that Petitioner's term was subject to a contingency, which was termination upon reclassification, and that such contingency does not prevent consideration of the value of Petitoner's lease-

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7. Although *Title 37, Chapter 2, Art. 3*, contains many provisions about the sale of state lands, none of the statutes therein say that sale terminates the unexpired lease term. Thus, the sale would not effect the lessee's rights for the unexpired term but would simply substitute the purchaser to the rights of the original lessor. *Eldredge* v. *Jensen*, 19 Idaho 243, 404 P.2d 624, discussion under syllabus 1, and *Garetson* v. *Hester*, 57 Cal. App. Rptr. 2d 39, 133 P.2d 863, discussion under syllabus 1.

hold upon condemnation, but is simply an element or circumstance to be considered by the trier of fact. There was no evidence below to contradict Petitioner's testimony that there would have been two ten-year renewals before reclassification. Appraiser Rowe, upon whom Arizona places so much reliance, found preference for renewal officially sanctioned and practiced as a custom. (A. 28) His appraisal said nothing about termination upon reclassification. The closest vesting case that Petitioner can find is *Yates v. Hawkins*, 46 N.M. 249, 126 P.2d 476, which held that a statutory right to repurchase land by a delinquent taxpayer was not vested (absolute) because the right did not extend to when the state itself was the purchaser at the tax sale. No case says a property right to be compensable in condemnation must be vested. The above authorities, as to a termination possibility, are contrary.

QUESTION PRESENTED II

Arizona states very little about Petitioner's Question Presented 2, which is that even if *Lassen v. Arizona Highway Dep't.*, above, is against it, the school trust received full value for its interest because the share awarded to Arizona was more than Arizona would have received but for enhancement in value of the land because of the use of the land in conjunction with Alamo's valuable by-the-river farm land. Arizona's primary opposition is a conclusion of Mr. Rowe in his appraisal, see pages 15-46 of the Appendix, that Petitioner would only receive the value of its leasehold interest. Since such an opinion of law is obviously not binding upon the court, Petitioner in its Opening Brief and now emphasizes the testimony before the District Court and some of Mr. Rowe's conclusions that

were within his expertise.[8] As did Petitioner's appraiser, Mr. W. D. Davis, Mr. Rowe recognized that the state lands in question were valuable because their use with Alamo's fee land irrigated pasture allowed a livestock breeding nuclei to be maintained during dry periods, A. 21, and permitted maintaining livestock in a dry season or until more favorable circumstances for forage production occurs. (A. 24, 25)

Petitioner's appraiser agreed with Mr. Rowe's conclusion, A. 21, that the state lease land, being barren and higher than Alamo's irrigated farm land upon the valley floor by the river, had very little present usefulness except for a use associated with such irrigated, developed land. T. 86, 87, discussed in Petitioner's Opening Brief at 7. The District Court understood this association, for it said:

> "Alamo asserts that, were it not for the condemnation proceedings, the premises in question would have been continuously leased to it by the State, and the true value of the premises would be reflected in the use of the premises in connection with other properties owned or controlled by Alamo as a cattle ranch; that the property would otherwise be, relatively, of no value." Appendix at 2

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8. Experts can only give opinions and conclusions within the range of their specialities. *Farris v. Interstate Circuit*, 116 F.2d 409 (5th Cir.); *Faircloth v. Lamb-Grays Harbor Co., Inc.*, 467 F.2d 685 (5th Cir). A layman's opinion on a matter of law has no probative value. *Glens Falls Ins. Co. v. Gray*, 386 F.2d 520 (5th Cir.); *Spellman v. American Barge Line Co.*, 176 F.2d 716 (3rd Cir.).

Although the Opinion and Judgment of the District Court did not specifically say that Alamo's assertion was adopted by the District Court as a finding, a reading of the Opinion and Judgment shows this was the opinion of the District Court. Regardless, the testimony supports such a finding. It is axiomatic that a judgment will be upheld if there is any factual basis to support it. *Brown* v. *Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469, discussion under syllabus 13; *Jaffke* v. *Dunham*, 352 U.S. 280, 77 S. Ct. 307, 1 L. Ed. 2d 314, discussion under syllabus 1.[9]

Respectfully submitted,

/s/ Gordon Cook

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9. The two (2) syllabus references refer to the Supreme Court Reporter.

CERTIFICATION

J. Gordon Cook, being duly admitted to practice before the Supreme Court of the United State of America, herewith certifies that three copies of the Reply Brief have been delivered to the State of Arizona by depositing the same in the office of the attorney for the State of Arizona who appeared below in the District Court and the United States Court of Appeals for the Ninth Circuit, to-wit: Peter C. Gulatto, Assistant Attorney General, State of Arizona, State House, Phoenix, Arizona 85007.

Additionally, as a courtesy, I herewith certify that service of three copies of this Reply Brief has been made upon the United States of America by depositing the same in a United States mailbox, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

J. Gordon Cook